Carrier Corporation *and* Kenneth W. Crosby. Case 28–CA–16727.

December 6, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On August 10, 2001, Administrative Law Judge Lana H. Parke issued the attached decision. The Charging Party filed exceptions and a supporting brief,[1] and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Carrier Corporation, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. December 6, 2001

Peter J. Hurtgen,	Chairman
Wilma B. Liebman,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Benjamin W. Green, Atty., for the General Counsel.
Ron Klepetar, Atty., of Los Angeles, California, for the Respondent
Randy Rumph, of Las Vegas, Nevada, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This case was tried in Las Vegas, Nevada, on June 1 and June 13, 2001. The charge was filed by Kenneth W. Crosby (Mr. Crosby) on September 7, 2000,[1] alleging that Carrier Corporation (Respondent) violated Section 8(a)(1) of the Act. The complaint was issued on January 30, 2001, and amended at the hearing.

The issues to be addressed are whether Respondent threatened employees with unspecified reprisals for engaged in concerted protected activities, threatened employees with discharge for refusing to engage in union activity, threatened employees with layoff because of their concerted protected activities and their participation in Board proceedings, and laid off Mr. Crosby because he engaged in concerted protected activity and to discourage employees from engaging in concerted protected activity.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is engaged in the service of heating, ventilation, and air conditioning components in the Las Vegas area with a facility in Las Vegas, Nevada, where it derived gross revenues in excess of $500,000 from the conduct of its business operations in the 12-month period ending Septem-

[1] No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) by equating protected concerted activity with disloyalty to the Respondent, by making implied threats of reprisals to employee Kenneth Crosby because he engaged in protected concerted activities, and by prohibiting employee Warren Winchester from talking with Crosby about protected concerted activities. In addition, no exceptions were filed to the judge's dismissal of the allegation that Supervisor Anthony Derfoldi threatened Crosby in violation of Sec. 8(a)(1).

[2] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Charging Party's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Charging Party's contentions are without merit.

[3] In adopting the judge's finding that the Respondent did not violate Sec. 8(a)(1) when it laid off Crosby, we find it unnecessary to pass on the judge's finding that the General Counsel failed to satisfy his initial burden under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to establish that Crosby's protected concerted activities were a motivating factor in the Respondent's decision to lay him off. Even assuming arguendo that the General Counsel met his threshold burden under *Wright Line*, we conclude that the Respondent has demonstrated that it would have laid off Crosby even in the absence of such activities. In so concluding, we particularly rely on the judge's finding that credited testimony establishes a "concrete and lawful reason for selecting Crosby for layoff," namely his insubordinate refusal at the July 5, 2000 meeting to acknowledge the Respondent's authority to assign work to employees. In addition, we rely on the credited testimony establishing that Crosby had more customer complaints than other employees, which provided the Respondent with a reasonable basis for believing that Crosby's work performance was worse than that of the other employees. For these reasons, we agree with the judge that the complaint should be dismissed insofar as it alleges that Crosby's layoff was unlawful.

Chairman Hurtgen would adopt the judge's decision in its entirety, including her finding that the General Counsel failed to establish that Crosby's protected concerted activities were a motivating factor in the Respondent's decision to lay him off.

[1] All dates are in 2000 unless otherwise indicated.

ber 7. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. [2]

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

From its Las Vegas facility, Respondent primarily services installed industrial air conditioners, employing service technicians (also called mechanics) who are represented by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, Local 525 (the Union.) The air-conditioning systems serviced by Respondent fall into two main categories: unitary (used in smaller buildings) and applied (used in large systems of over 100 tons and involving centrifugal chillers.) The union contract describes four technician classifications, including mechanical service journeymen, servicemen, and apprentices. Journeyman technicians primarily perform applied work and receive a much higher pay rate than the servicemen who primarily do unitary work. Servicemen receive 65 to 70 percent of the journeymen rate.

At times relevant hereto, Van Hoppler (Mr. Hoppler) was the territory service manager (branch manager) of Respondent, and Anthony "Tony" Derfoldi (Mr. Derfoldi) was the service supervisor, both stationed at Respondent's Las Vegas facility. [3] In authority over Mr. Hoppler was Kal Hassaneih (Mr. Hassaneih), Regional Manager, whose offices were in City of Industry, California. Bruce Burton, corporate manager (Mr. Burton) was Mr. Hassaneih's superior.

In 2000, Respondent experienced a downturn in production. Mr. Hassaneih testified that business decreased dramatically after the first of the year as demonstrated by the Las Vegas office's monthly financial reports, which he regularly reviewed. The January report showed a plan (expectation) deviation of minus $23,394, in February a plan deviation of minus $119,578, in March a plan deviation of minus $355,813, in April a plan deviation of minus $276,626, in May a plan deviation of minus $248,506, and in June, a plan deviation of minus $406,060.[4] According to Mr. Hoppler, in early 2000 Respondent was also trying to move its service emphasis from applied work to unitary work. By April, Mr. Hassaneih began pushing Mr. Hoppler to lay off technicians to cut expenses. Mr. Hoppler testified that Mr. Hassaneih talked to him many times about the need to reduce labor costs in order to maintain profitability. Mr. Hoppler was reluctant to lay off technicians, as it was difficult to get a good technician back after a layoff. Mr. Hassaneih said he continued to press Mr. Hoppler to lay off technicians throughout 2000 until Mr. Hoppler left Respondent on December 8. The decision as to whom to lay off was left with Mr. Hoppler.

Mr. Crosby worked as a journeyman technician for Respondent from September 3, 1996, until his layoff on July 10. On May 24 through July 4, he was absent from work on medical leave. At the time of his layoff, he worked on centrifugal chillers (applied) and unitary equipment.

In March and April, employees discussed with each other their dissatisfaction with Mr. Hoppler's management style. Mr. Crosby drafted a letter dated May 1 (the complaint letter), which read:

> To Whom It May Concern:
>
> This notice is to inform you that the working conditions under which Carrier Employees at the Las Vegas Branch have been working under [sic] have become intolerable. This is due to the most part to the territorial manager Van Hoppler's extreme, abusive and aggressive style of supervising. Some employees have even received physical threats.
>
> We can no longer work under such intimidating management. It adversely affects the productivity and morale of the employees. We will be happy to present you with all of the facts you need to support this complaint.

Mr. Crosby showed the letter to Warren Winchester (Mr. Winchester) who signed it. Mr. Crosby asked Mr. Winchester to solicit signatures from other employees. Mr. Winchester obtained signatures from employees Jerry Carter (Mr. Carter), Ryan Webb (Mr. Webb), Ron Haigwood (Mr. Haigwood), and Al Williams (Mr. Williams). When the letter was returned to Mr. Crosby, he signed it and faxed it to corporate headquarters on May 15. [5]

The complaint letter was routed from Respondent's corporate office to Mr. Hassaneih. Being very concerned about the letter, he and Mr. Burton flew to Las Vegas the next day to meet with the technicians. On May 18, Mr. Hassaneih and Mr. Burton convened a meeting of all service technicians in Respondent's conference room at about 1 p.m. Mr. Hassaneih thanked employees for writing the letter, saying that without it he would not know there was a problem. Mr. Burton told employees that the corporate president had received the complaint letter and that Respondent considered it a very serious matter. He said that Respondent would take the proper measures to investigate and rectify problems. Each employee was then invited to discuss which working conditions he found intolerable, and Mr. Burton asked each employee, in turn, if he had a problem currently with Mr. Hoppler. According to Mr. Crosby, Mr. Winchester responded first and gave examples of problems he had with Mr. Hoppler, as did Mr. Carter. Mr. Winchester testified that he talked about Mr. Hoppler's mood swings. Mr. Haigwood and Mr. Williams said they had no current problems with Mr. Hoppler. Rick Sorenson, lead technician (Mr. Sorenson) said he had some problems. Mr. Crosby complained that Mr. Hoppler sometimes asked employees if they liked their jobs, which employees took as implied threats. He also recounted episodes of Mr. Hoppler's behavior

[2] Where not otherwise noted, the findings are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

[3] In December, Mr. Hoppler resigned to form his own air conditioning service company, and Mr. Derfoldi was promoted to branch manager.

[4] Although less significant because Respondent did not expect its branch offices to perform as well as or greater than the preceding year, the monthly reports prior to Mr. Crosby's layoff showed even greater deficits there. The January report showed an income decrease of $518,644 from the previous year, in February a decrease of $792,614, in March a decrease of $1,092,088, in April a decrease of $1,098,375, in May a decrease of $1,033,247, and in June a decrease of $1,203,896.

[5] Testimony was presented regarding the discussions of employees prior to the preparation of the complaint letter and the specific conduct of Mr. Hoppler that gave rise to employee dissatisfaction. As it is clear that the actions of employees in discussing Mr. Hoppler's management style and drafting and signing the complaint letter constitute concerted protected activity, I find it unnecessary to explicate the discussions or the complaints, none of which reflect violations of the Act by Mr. Hoppler.

while intoxicated, including an incident between Mr. Hoppler and Mr. Webb. When his turn came, Mr. Webb said he did not want to talk about the incident as it had occurred over a year before. Mr. Burton and Mr. Hassaneih asked whether employees had observed Mr. Hoppler drinking on the job, which employees denied.[6] Mr. Crosby also complained that the two technicians who had not signed the complaint letter (Jon Madden, shop steward (Mr. Madden) and Mr. Sorenson) were receiving preferential treatment. According to Mr. Madden, Mr. Crosby had more to say than any other employee. Mr. Madden also testified that Mr. Burton and Mr. Hassaneih said they had shown the complaint letter (with signatures redacted) to Mr. Hoppler and discussed its details with him. They told employees he had agreed to take anger management classes. Mr. Hassaneih assured employees that no one would be fired becaus of the complaint letter.

Following the meeting, Mr. Burton and Mr. Hassaneih talked to employees in the shop and in the parking lot. Mr. Crosby testified that he formed part of a group including the two corporate officials in the parking lot. Mr. Burton said that no employee would be laid off or terminated because of the complaint letter. Mr. Crosby said he felt they should terminate Mr. Hoppler to avoid likely retaliation. Mr. Hassaneih said there would be no retaliation because he would be monitoring all that went on in the office. Mr. Hassaneih gave employees his cellular number and encouraged them to call any time they wished. Later that same day, Mr. Crosby met alone with Mr. Hassaneih in Respondent's conference room, and Mr. Hassaneih asked for more examples of Mr. Van Hoppler's behavior. Mr. Crosby's responses were essentially the same as previously related. According to Mr. Hassaneih, Mr. Crosby wanted to know what was going to be done with Mr. Hoppler, arguing that he shouldn't be working for the company, but Mr. Hassaneih declined to discuss that.

Later that day, Mr. Crosby, being dissatisfied with the outcome of the meetings, asked for another meeting with Mr. Hassaneih. On the following day, May 19, Mr. Crosby, along with his wife, Julie (Mrs. Crosby), and Mr. Carter, met with Mr. Hassaneih at a local fast food restaurant. Mr. Crosby told Mr. Hassaneih that he was concerned about retaliation from Mr. Hoppler for his part in the complaint letter. Mr. Hassaneih assured him that no one would be terminated because of it.

Mr. Hassaneih testified that during his discussions with employees, he mentioned management concerns about the lack of business and why most of them were not working full time. He did not tell the employees that he had recommended a layoff as he did not think that would be the right thing to do.

Following the meetings, Mr. Hassaneih met several times with Mr. Hoppler. He told him the complaint letter accused him of having an intimidating style; without divulging names, he told him what had been said in meetings with employees, and he directed Respondent's Human Resources department to arrange for Mr. Hoppler's attendance at management classes. Mr. Hassaneih discussed again with Mr. Hoppler the need to lay off technicians, warning him he could not lay off or fire anyone because of the complaint letter and instructing Mr. Hoppler to let him know once he had decided on a technician for layoff.

Thereafter, as instructed by his superiors, beginning shortly after May 18, Mr. Hoppler held meetings with each technician (Van Hoppler meeting) to discuss the complaints.

Mr. Crosby testified that sometime between May 18 and 24, he was called into Mr. Hoppler's office. Mr. Hoppler had the complaint letter before him, and he read it to Mr. Crosby, adding, "I'm just letting you know that everybody's going to have to go by the contract now."[7]

Mr. Madden also testified about the Van Hoppler meeting with Mr. Crosby.[8] According to Mr. Madden, Mr. Hoppler explained the purpose of the meeting, referred to the complaint letter, and asked Mr. Crosby what working conditions were intolerable. Mr. Hoppler said he felt like he was stabbed in the back by the complaint letter being sent to his superiors over his head, that it was a sneaky way of going about it. He said he wished Mr. Crosby could have brought it up with him person-to-person and tried to work out problems. Mr. Crosby said that he had tried to discuss situations with Mr. Hoppler but had never been able satisfactorily to resolve issues with him. Mr. Crosby also said that he wished Mr. Hoppler were nicer to him, that he could get more production out of employees if he were more friendly and more personal with employees. He mentioned, as an example, one morning when Mr. Hoppler refused to shake his hand. He said that if Mr. Hoppler were nicer to the workers, they would be more inclined to perform better for him. Mr. Hoppler said, "I don't have to be your friend. I'm your boss. This is [personnel] relations here. Basically I'm here to run the work force, and you're to do what you're asked to do in the work performed. So what you're telling me is if I'm not going to be your friend and shake your hand and say hi to you every time you come in the door, then you're not going to perform the work that Carrier's paying you to do?"

Mr. Crosby answered, "That's exactly what I'm saying."[9]

Mr. Madden also recounted a Van Hoppler meeting he attended with Mr. Winchester. Mr. Winchester told Mr. Hoppler that he was a hard person to get along with but did not cite specifics. Mr. Winchester recalled that he told Mr. Hoppler that the intolerable conditions were the way he treated employees, making disparaging jokes, saying demoralizing things, and threatening to fire people on a whim. According to Mr. Winchester, Mr. Hoppler accused him of just being disgruntled because Mr. Hoppler reprimanded him.

[6] Respondent objected to the complaints by employees as hearsay. Counsel for the General Counsel said the statements were not offered for the truth of the assertions as to Mr. Hoppler's conduct. The statements were admitted as evidence of ongoing concerted protected activity. It is unnecessary to the concerted protected nature of the employees' complaints to find that Mr. Hoppler was guilty of the accusations, and I make no finding as to Mr. Hoppler's conduct.

[7] Mr. Crosby did not mention this meeting on direct examination. On cross examination, he testified as set forth but was not asked for further explication.

[8] Mr. Madden placed the meeting on July 5, after Mr. Crosby returned from medical leave. However, Mr. Madden also testified that he did not remember dates, but he recalled it was a meeting with Mr. Hoppler, Mr. Crosby, Mr. Derfoldi, Mr. Sorenson, and himself. Because the subject matter, as recalled by Mr. Madden, related solely to the complaint letter, and because Mr. Derfoldi credibly testified that he did not attend the July 5 meeting between Mr. Hoppler and Mr. Crosby, I conclude that Mr. Madden has confused the date, and that Mr. Crosby's Van Hoppler meeting occurred in May as Mr. Crosby testified. As to whether or what parts of the conversation related by Mr. Madden occurred at the July 5 meeting is unclear.

[9] Notwithstanding the confusion over its date, Mr. Madden's recall of the conversation was clear and detailed. He appeared forthright and sincere. I accept his testimony without finding it necessary to determine which part of it may have occurred in May and which on July 5.

Although Mr. Madden did not attend any other Van Hoppler meetings, Mr. Hoppler informed him, as the union steward, that he had met with Mr. Webb, Mr. Haigwood, and Mr. Carter in a group as requested by the three employees who had said they did not need the union steward to be present. Mr. Hoppler told Mr. Madden that the three employees said they did not have any specific problems, that they had felt coerced to sign the letter, feeling they would be singled out if they didn't. As for Mr. Madden, Mr. Hoppler called him on his cell phone at work to discuss the complaint letter. Mr. Hoppler asked Mr. Madden if he had any intolerable conditions he wanted to bring out. Mr. Madden told him he hadn't ever really had a problem with Mr. Hoppler that he couldn't discuss, and he did not feel it necessary to have a meeting.

Sometime the first part of June, while Mr. Crosby was on medical leave, Respondent changed its service scheduling and workload and responsibility assignment system so that service technicians were designated as the primary technician for specific customers or work sites. The object of the change was to enhance productivity by assigning technicians to service equipment they were familiar with.

On June 21 or 26, Mr. Crosby telephoned Mr. Derfoldi and informed him that his doctor had released him to return to work. Mr. Derfoldi said he didn't have the work at that time as it was slow and asked Mr. Crosby to extend his recovery time. Mr. Crosby did so until July 5. On his return from medical leave on July 5, Mr. Crosby saw Mr. Hoppler in the break room. Mr. Crosby offered to shake hands, and Mr. Hoppler said, "I don't shake hands with people like you."

Mr. Crosby asked, "Can—are you man enough to put these—the problems behind us and try to get along?"

Mr. Hoppler said, "Not with someone who stabs me in the back."

On that same day, July 5, Mr. Crosby met with Mr. Derfoldi. There are significant differences among the accounts of Mr. Crosby, Mr. Hoppler, and Mr. Madden regarding the meeting. Inasmuch as statements made in the meeting are germane to the issue of whether Mr. Derfoldi bore animus toward Mr. Crosby because of his protected activities or threatened him with discharge because he failed to participate in union activities, I have set out the various accounts in detail.

Mr. Crosby's account: when he returned from medical leave he went into Mr. Derfoldi's office. Mr. Derfoldi called in Mr. Madden and Mr. Sorenson, and then informed Mr. Crosby that he would have to go by the [Union] contract with regard to his working hours. Mr. Crosby said he did not have a problem with the working hours, that he was not one who had received preferential treatment, and he had no problem with the contract. Mr. Derfoldi told him that if he had a problem with the contract, he would have to speak to the shop steward about it. Mr. Crosby said he did not recognize Mr. Madden as shop steward because he received preferential treatment and did not look out "for the guys at that job site." Mr. Crosby also said he did not recognize Mr. Sorenson as lead technician because the classification was not in the union contract and because he too got preferential treatment. Mr. Madden and Mr. Sorenson left the room, and Mr. Derfoldi told Mr. Crosby that the comments he had made would get him terminated.

Mr. Derfoldi's account: Mr. Crosby met with him on July 5, and complained to him about the work dispatches he had received on returning from medical leave. Mr. Derfoldi called Mr. Sorenson and Mr. Madden into the meeting, the latter so that Mr. Crosby could pursue union contract issues if desired. Mr. Crosby said that he did not recognize the lead mechanic's authority to make work assignment decisions and challenged Mr. Derfoldi's right to decide what jobs he worked on. Mr. Derfoldi told Mr. Crosby that he should raise those concerns with his union steward. Mr. Crosby said he did not recognize Mr. Madden's authority as a union steward. Mr. Derfoldi testified that he ended the conversation by saying "that [he] considered it insubordination when [Mr. Crosby] refused to recognize everybody's authority in the room and that in itself I thought—I believed were grounds for termination—refusing to do work or take specific jobs, and if he had a place—if he had a complaint, unless he didn't want to go to the job [he] assigned him, that he needed to file a complaint with the Union." Mr. Crosby responded that he wanted to talk to Mr. Hoppler.

Mr. Madden's account: Mr. Derfoldi asked him to be present as union steward since Mr. Crosby had requested a meeting. At the meeting, Mr. Derfoldi told Mr. Crosby he had asked Mr. Madden to be present as union steward and Mr. Sorenson as lead mechanic. Mr. Crosby said that he did not recognize Mr. Sorenson as a lead mechanic as there was no provision for such in the union contract, and he did not recognize Mr. Madden as union steward as the Union had never appointed him. Mr. Derfoldi said he had the right to assign one technician to a lead position and that Respondent had been notified in writing of Mr. Madden's union stewardship appointment.[10] Mr. Crosby complained about his new job assignments, saying that he felt he was being excluded from job sites he wanted. Mr. Derfoldi explained that each technician was assigned to even groupings of job sites due to business reasons, including a computer system conversion. Mr. Derfoldi said he had the right through the union contract to assign the workforce as he thought necessary. Mr. Crosby said he considered it a violation of the contract, that Mr. Derfoldi was not even a technician or mechanic and didn't know what kind of work Mr. Crosby was capable of doing. He asked, "What gives you the right to tell me what jobs I can go to and what I'm qualified to work on?" Mr. Derfoldi told Mr. Crosby that if he felt there was any violation of the contract, he could address that through a union grievance.

Mr. Sorenson's account: he believed the purpose of the July 5 meeting was to discuss chain of command and delegation of authority. He testified that in the course of the meeting, Mr. Crosby said he did not acknowledge Mr. Sorenson as lead technician, Mr. Madden as union steward, or Mr. Derfoldi as his supervisor because Mr. Derfoldi did not know how to work on chillers.

I credit Mr. Derfoldi, Mr. Madden, and Mr. Sorenson's accounts of this conversation. Neither Mr. Sorenson nor Mr. Madden has any demonstrated bias or basis for slanting their testimonies. They are neutral witnesses. Mr. Madden's testimony was particularly detailed, cogent, and logical. I give his testimony significant weight and note that in essentials, Mr. Derfoldi and Mr. Sorenson corroborated it. Although each account varied, the consensus of their testimonies was that Mr. Crosby complained of his job assignments and rejected the authority of Mr. Derfoldi and Mr. Sorenson and the standing of Mr. Madden. Where his testimony conflicts with that portrayal of the meeting, I do not credit Mr. Crosby.

[10] A letter dated March 10, from the Union to Respondent appointing Mr. Madden as shop steward was received into evidence.

At the conclusion of the discussion between Mr. Crosby and Mr. Derfoldi, Mr. Crosby said that he wanted to have a meeting with Mr. Hoppler to find out if he was or wasn't going to be terminated. Mr. Derfoldi left and when he returned told Mr. Crosby that Mr. Hoppler had agreed to have a meeting.

Mr. Crosby testified that he and Mr. Derfoldi went to the conference room where Mr. Hoppler, Mr. Madden, and Mr. Sorenson were present. Mr. Hoppler did not testify regarding this meeting, and Mr. Derfoldi denied that he was present.

According to Mr. Crosby, at this meeting, although Mr. Hoppler did not have a copy of the complaint letter before him, he asked Mr. Crosby his definition of the words used in the complaint letter, i.e., extremely abusive and aggressive behavior. Mr. Crosby said his definition was the way Mr. Hoppler treats employees and gave as examples Mr. Hoppler's calling him at a jobsite and asking if he needed to send someone out who knew what he was doing, or if he liked his job. Mr. Hoppler said he behaved that way to everybody. Mr. Crosby said, "Well, you don't do it to Rick [Sorenson]."

Mr. Sorenson said, "Yes, he does. He does it to me all the time." Mr. Crosby said he would not accept it. Mr. Hoppler asked if Mr. Crosby meant that he would not work for him if was not nice to all the employees. Mr. Crosby denied that and said he meant that when employees are upset, their performance is diminished. When the meeting concluded, Mr. Crosby offered to shake hands, but Mr. Hoppler refused, saying, "That's all we got." Mr. Crosby asked for and was given a copy of notes Mr. Hoppler had taken in the meeting.[11] Mr. Crosby's account of this meeting is not contradicted by any witness, but I cannot give it full weight as an account of Mr. Crosby's July 5 meeting with Mr. Hoppler because it lacks internal congruity. Mr. Crosby's stated reason for demanding a meeting with Mr. Hoppler on July 5, was because Mr. Derfoldi had said his conduct was grounds for termination. Yet Mr. Crosby did not testify to having raised that subject with Mr. Hoppler at all, and the asserted meeting content does not rationally follow the preceding events. As the complaint letter was covered in Mr. Crosby's May meeting with Mr. Hoppler, it makes no sense that it should be fully discussed again. Considering all testimony regarding his July 5 meeting with Mr. Hoppler, I can only conclude that Mr. Crosby—like Mr. Madden—at least in part, confused what occurred in his May Van Hoppler meeting with what took place on July 5. However, the evidence suggests, and it is reasonable to infer, that Mr. Hoppler expressed animosity toward Mr. Crosby's participation in the complaint letter in both meetings. The evidence also shows that Mr. Hoppler focused on Mr. Crosby as the complaint letter's main proponent.

At about this time, Respondent began preparations for a layoff. According to Mr. Hoppler, when it "got to summer," he told Mr. Derfoldi, Mr. Sorensen, and Mr. Madden to start thinking about a layoff. It was not unexpected news for Mr. Derfoldi who testified that he had overheard conversations between Mr. Hassaneih and Mr. Hoppler regarding Mr. Hassaneih's decision that a layoff was necessary. Mr. Hoppler had also told him that he was being pressured to lay someone off. In late June, Mr. Derfoldi requested Mr. Crosby to extend his medical leave beyond June because of lack of work. Thereafter, Mr. Hoppler directed Mr. Derfoldi to lay someone off in order to get Respondent's labor costs in line. Mr. Derfoldi denied that Mr. Hoppler had ever indicated that he wanted Mr. Crosby selected for layoff.

Prior to selecting an employee for layoff, Mr. Derfoldi consulted Mr. Sorenson and Mr. Madden.[12] Though not specifically testifying about participation in the selection process, Mr. Sorenson testified that while Mr. Crosby was on medical leave, Mr. Sorenson serviced a number of Mr. Crosby's work sites and discovered numerous problems with the equipment Mr. Crosby had worked on. He reported the problems to Mr. Hoppler and Mr. Derfoldi. He also testified that in his opinion, Mr. Crosby was guilty of "milking" (taking excess repair time on) some jobs. He said he had accused Mr. Crosby of milking jobs and reported it to Mr. Hoppler and Mr. Derfoldi on more than one occasion.[13] Mr. Sorenson also testified that he had received complaints from Sam's Town, the Review Journal, Jerry's Nugget, and Caesar's Palace regarding Mr. Crosby's work, which he reported to Mr. Hoppler and Mr. Derfoldi. Thereafter, Mr. Crosby was sent to those businesses for emergency work but not on a regular basis. Mr. Hoppler also testified of complaints about Mr. Crosby's work from Caesar's, the Review Journal, and Jerry's Nugget. He neither investigated the complaints nor spoke directly to Mr. Crosby concerning them. It was his practice, he said, to tell the complaining customer that Respondent would send another person out and do better for them and to caution employees as a group to be careful of their work quality and behavior.

Mr. Derfoldi testified that he selected Mr. Crosby for layoff because of customer complaints, and because he believed him to have excessive repair time and excessive repair return calls. Specifically, Mr. Derfoldi recalled that Ron Vandeist, assistant chief of Sam's Town (a Boyd Gaming property), Ron Ranulf, facilities director of the Review Journal, and Pete Kurner of Stardust Hotel complained about Mr. Crosby's work.[14] Mr. Derfoldi testified that although he discussed the complaints with Mr. Crosby, he did not document either the discussions or the complaints. He also did not document excessive repair time or return repair calls because he did not consider Mr. Crosby's range of excessive time or repair call backs to be so significant as to justify termination. According to Mr. Derfoldi, it was not Respondent's practice to document complaints. He said, hypothetically, that if an employee appeared to have such excessive complaints or problems that discharge would be warranted, Respondent would then document that employee's work problems. While admitting he had no objective verification of his opinion, he said that he believed Mr. Crosby to be the worst offender in terms of excessive repair time and callbacks. Mr. Derfoldi also considered that Mr. Crosby was the least senior of

[11] Mr. Crosby testified that he had misplaced the copy in his relocation to Florida.

[12] Mr. Derfoldi testified that Mr. Hoppler was among those he consulted, but both he and Mr. Hoppler are adamant that Mr. Hoppler did not participate in the selection.

[13] Mr. Crosby denied that Mr. Sorenson had ever complained to him about his job performance. I credit Mr. Sorenson's testimony. I found him to be direct and sincere.

[14] Ray Murphy (Mr. Murphy), chief engineer of the Stardust Hotel and supervised by Pete Kurner during 2000, testified that he had no problems with Mr. Crosby's work and knew of no dissatisfaction by anyone else. He did recall complaining sometime in 2000 that filters had not been changed for several years and requesting all the invoices and work orders although he did not, apparently, hold Mr. Crosby responsible. In these circumstances, I cannot find that Mr. Murphy's testimony effectively rebuts Mr. Derfoldi's assertion that Mr. Kurner asked for Mr. Crosby's replacement as Stardust service technician.

the journeyman applied mechanics. Mr. Derfoldi further testified that Mr. Crosby's conduct during the July 5 meeting and his opposition to Respondent's work assignment changes significantly influenced his decision to lay off Mr. Crosby. Although Mr. Crosby's conduct in the July 5 meeting fell last in the list of reasons given by Mr. Derfoldi for selecting him for layoff, Mr. Derfoldi testified that it was Mr. Crosby's conduct in denying Mr. Derfoldi's authority that most influenced the layoff decision. He said he found objectionable Mr. Crosby's refusal to "recognize the authority that I had to assign job assignments. He didn't recognize the authority of the union steward if he had a complaint to deal with any issues as far as represented labor or my lead mechanic at the time . . . . to assess abilities of other mechanics and to determine what levels and what places they should work at, and blanket statements that he had made that . . . . he does not work for us, he works for the union." When asked by counsel for the General Counsel if he had based his selection, at least in part, on Mr. Crosby's refusal to pursue his complaints with the union steward, Mr. Derfoldi answered, "No, not at all."

According to Mr. Hoppler, in early July, Mr. Derfoldi, Mr. Sorensen, and Mr. Madden came to him and recommended that Mr. Crosby be laid off. Mr. Derfoldi and Mr. Sorensen expressed their reasons for selecting Mr. Crosby, and Mr. Madden, as Union steward, merely agreed. Mr. Derfoldi and Mr. Sorensen pointed out that the applied work, which Mr. Crosby performed, was less busy than the unitary work and a journeyman mechanic qualified to do applied work was costly. Both had concerns about Mr. Crosby's customer calls and performance.[15] Mr. Hoppler agreed with their choice. He denied that he ever suggested to Mr. Derfoldi or Mr. Sorensen that they should select Mr. Crosby or that his ratification of the selection had anything to do with the complaint letter. Mr. Derfoldi and Mr. Hoppler credibly testified as to the layoff selection process, and I find that although he approved the choice of Mr. Crosby for layoff, Mr. Hoppler had no part in his selection.

Emails dated July 5 from Mr. Hoppler to Mr. Derfoldi and July 6 from Mr. Derfoldi to Mr. Hoppler were identified and received into evidence without explanation or testimony. The July 5 email from Mr. Hoppler reads:

> On Friday, July 7th Carrier Law Vegas will lay off Ken Crosby . . . . This is a reduction in work force due to lack of work. We have lost 2 large service agreements in the past month and feel these actions must be taken immediately.
>
> Linda, Ken has $100.00 of Carrier imprest money. Please have this deducted from his final pay check.

The July 6 email from Mr. Derfoldi reads:

> Van,
>
> Due to the loss of 2 large service agreements and a lack of scheduled work, we need to reduce our work force. This action must be taken immediately.
>
> I am recommending that Ken Crosby . . . . be the first lay off beginning July 7th.

The General Counsel argues that the emails show Mr. Hoppler directed the layoff of Mr. Crosby. It is unfortunate that neither the General Counsel nor Respondent inquired into the circumstances of the emails for they are confusing as dated. The contents of the emails only make sense if Mr. Derfoldi's preceded Mr. Hoppler's. Because of this confusion, and because a rational reading suggests that Mr. Hoppler's email was misdated, I do not find this evidence to be probative of whether Mr. Hoppler made the decision to lay off Mr. Crosby.

Mr. Hoppler notified Mr. Hassaneih that he was going to lay off Mr. Crosby. Mr. Hassaneih questioned him closely as to why he had chosen that particular technician. Mr. Hoppler said that Mr. Crosby was a highly paid technician and the other technician who was also highly paid had been with the company for over 20 years. Mr. Hoppler said Mr. Derfoldi and the shop steward suggested the choice, and he thought it was the right thing to do financially. Mr. Hassaneih then approved the layoff of Mr. Crosby.

Although Respondent admits there was no explicit advance warning of layoffs, Mr. Hoppler testified that in his morning work meetings with employees, he had discussed the business slowdown. Mr. Hassaneih also testified he discussed the company's economic problems in his meetings with employees in May. Prior to the historically slow summer months, technician labor hours had already been reduced to 32 hours a week, and Mr. Crosby was asked to extend his medical leave because of lack of work.

On July 10, when Mr. Crosby reported to work, he noticed that his name was not on the dispatch board. After the morning technician meeting, Mr. Crosby joined Mr. Derfoldi in his office. Mr. Madden was present. Mr. Derfoldi informed Mr. Crosby he was laid off. According to Mr. Derfoldi, the discussion lasted at least an hour, and he told Mr. Crosby of his responsibility for productivity, profitability, time on the jobs, and other issues, including Mr. Crosby's being least senior journeyman technician. Mr. Crosby was given an Employee Status form noting his layoff for "labor reduction." Mr. Derfoldi drove Mr. Crosby home, stopping to eat on the way. According to Mr. Crosby, Mr. Derfoldi told him that he had laid him off so that he could get unemployment even though Mr. Hoppler had directed that he be fired. Mr. Derfoldi asked him not to pursue the issue because he would get in trouble with Mr. Hoppler for not doing as he had been ordered. Mr. Derfoldi denied telling Mr. Crosby that Mr. Hoppler had wanted to or instructed him to discharge Mr. Crosby. [16]

Mr. Crosby telephoned Mr. Hassaneih that same day as did Mrs. Crosby. Mr. Crosby testified that Mr. Hassaneih assured him he had not been laid off because of the complaint letter,

[15] In his posthearing brief, counsel for the General Counsel argues that testimony regarding recommendations by Mr. Sorensen and Mr. Madden is inadmissible hearsay and should not be credited. Counsel did not raise this object at the hearing, and it is untimely to raise it now. FRE 103 (a)(1). Moreover, both Mr. Madden and Mr. Sorensen testified at the hearing, and counsel was free to question them about their recommendations or lack thereof. While Mr. Sorenson did not specifically testify that he recommended Mr. Crosby for layoff, he was critical of Mr. Crosby's work and his testimony is neither inconsistent with Mr. Derfoldi's nor indicative of unreliability.

[16] I accept Mr. Derfoldi's testimony over that of Mr. Crosby. Mr. Crosby's testimony lacks logical consistency. It makes no sense for Mr. Derfoldi to have said Mr. Hoppler wanted him to terminate Mr. Crosby and to request that Mr. Crosby not pursue the layoff issue since Mr. Hoppler could scarcely fail to learn that Mr. Crosby had been laid off rather than terminated.

that part of the reason was because he needed more time to heal from his work injury, and that as soon as the workload picked up he would be brought back. Mrs. Crosby testified that Mr. Hassaneih told her that he and Mr. Hoppler decided to lay off Mr. Crosby as there was not enough work, and it was in the best interests of the company. According to Mr. Hassaneih he explained to Mr. Crosby the company's economic situation. He did not say Respondent would recall Mr. Crosby shortly. I accept Mr. Hassaneih's testimony over Mr. Crosby's. He appeared candid and clear about conversations and events, and his testimony is consistent with Mrs. Crosby's.

Mr. Crosby grieved his layoff. On October 26, a meeting was held concerning the grievance at the union hall. Present were Milt Menchey (Mr. Menchey), business agent, Mr. Crosby, Mrs. Crosby, Mr. Madden, and Mr. Hoppler. Mr. Crosby testified that Mr. Hoppler said he had made the decision to lay off Mr. Crosby, that seniority was not a consideration, and that he used no criteria in making the layoff selection. According to Mr. Madden, Mrs. Crosby did most of the talking and said she felt Mr. Crosby's seniority rights had been violated. Mr. Menchey said there were no seniority clauses in any of the union contracts. Mrs. Crosby testified that Mr. Hoppler said he made the layoff decision along with Mr. Derfoldi, and the lead technician and that seniority had nothing to do with the decision. She also testified that Mr. Hoppler said there was no criteria to go by. Mr. Hoppler testified that he explained the selection of Mr. Crosby essentially as he explained it to Mr. Hassaneih, that he said his subordinates had collectively made the decision, and that there was no specific criteria set by the Union for layoffs. In saying he made the decision to lay off Mr. Crosby, he meant that, as the manager, he had ultimate responsibility for the decision.

Under cross-examination, Mr. Crosby varied his testimony somewhat and said that Mr. Hoppler said he talked to Mr. Derfoldi and Mr. Sorenson before making the layoff decision and that he stated, "I can do whatever I want." Mr. Crosby did not show a good recall of the meeting, stating that although there were other things said, he could not pull them out. There are normal variances in the testimony as to what was said, but it appears clear that Mr. Hoppler said he had made the layoff decision after input from Mr. Derfoldi and Mr. Sorenson and that seniority was not a factor. I do not credit Mr. Crosby's testimony that Mr. Hoppler said he used no criteria in making his selection. Mr. Hoppler testified he said the Union had no specific criteria, and Mrs. Crosby and Mr. Madden's testimonies also suggest that the discussion focused on whether any contractual criteria had to be followed. I accept Mr. Hoppler's testimony about what he said and find he merely made an accurate observation that the union contract establishes no criteria for layoff selection and that Respondent has the contractual right to make an arbitrary decision.

Following the meeting, Mr. Menchey said he would present the facts to the union attorney, and a decision would be made whether to pursue the grievance further. Sometime later, the Union decided to drop the grievance.

Regarding Respondent's complaints about his work, Mr. Crosby denied that any supervisor had ever notified him of customer complaints or, since his first year of employment, driving complaints. He said that Mr. Hoppler regularly told him he did a good job, and in October or November 1999, while at a restaurant/bar, had told him he loved him as a technician and that he should never leave the company. According to Mr. Crosby, Mr. Hoppler also asked him to work for the company he intended to establish. Mr. Crosby told Mr. Hoppler to tell him that the next day.[17] Mr. Crosby also testified that he was given extra vacation a year earlier than other employees as a mark of Mr. Hoppler's respect for his work. On May 15, Mr. Hoppler notified Mr. Crosby that he was awarding him an additional week of vacation. The additional week of vacation was normally awarded to employees after 5 years' service. Mr. Hoppler told Mr. Crosby he was shortening the time to 4 years in his case. Later that day, Mr. Crosby received a letter confirming that an additional week of paid time off per year was awarded him "[I]n recognition for your continued good service and dedication to your profession." According to Mr. Hoppler, Respondent has no paid vacation policy. He developed a program of granting 1 week paid vacation after 5 years of employment as an award for longevity and dedication and additional paid vacation time after 8 years. The communication to Mr. Crosby was a form letter, a facsimile of which was given to each employee upon attainment of his fifth and eighth year of employment. Mr. Hoppler testified that Mr. Crosby was planning surgery at the time and asked for some financial assistance. Respondent, therefore, granted the additional vacation week a year early in response to Mr. Crosby's request and shortly before he left on medical leave.[18]

Following Mr. Crosby's layoff, Roger Derrick (Mr. Derrick) was hired as a unitary technician and thereafter laid off.[19] Doug Fenton (Mr. Fenton) transferred from Respondent's Miami office and worked for just a few months. He was transferred to the Las Vegas branch to work on a special project involving large installations on September and returned to Miami in December when the project did not work out. Mr. Winchester testified that of the employees who signed the complaint letter, Mr. Carter, Mr. Webb, Mr. Haigwood, and he were still working for Respondent. Mr. Williams took a voluntary layoff to work for Mr. Hoppler's newly formed company but was never replaced, and no one replaced Mr. Crosby. Project manager, Dan McGinty, was laid off on September 1.

Mr. Derfoldi testified that after Mr. Hoppler left the company, Respondent, in conformity with its usual practice, conducted an audit of company records. The auditor notified Mr. Derfoldi that former employees still had access to Respondent's private telephone network. Mr. Derfoldi's consequent review of telephone billing records led him to conclude that following his layoff, Mr. Crosby had opened an account on Respondent's private network and made phone calls on it to Mr. Winchester during work hours. Following his investigation, Mr. Derfoldi met with Mr. Winchester. He told him the number of hours he was spending on the phone during company time on a company

[17] Both the setting and Mr. Crosby's response suggest Mr. Crosby considered the statements to be *in vino* but without *veritas*. There is no evidence the effusive praise was repeated; therefore, I cannot find it provides evidence that Mr. Crosby was a stellar employee.

[18] I credit Mr. Hoppler's testimony. I found him to be direct and forthright. Respondent no longer employs him. Indeed, he is a competitor and, as such, has no reason to distort the facts. I conclude, therefore, that Mr. Crosby's being granted a week of vacation after four rather than 5 years does not signify that Respondent considered him to be an outstanding employee. However, Mr. Hoppler testified that he had told Mr. Crosby he was a good technician, and there is no evidence that Mr. Hoppler considered his work to be unsatisfactory in any way.

[19] As noted above, the position of unitary technician was paid at a significantly lower rate than the applied technician position held by Mr. Crosby.

cell phone that Respondent paid for was a conflict of interest both to productivity and "a conflict of Mr. Crosby with his issues with the company on company time." He told Mr. Winchester that he could talk to Mr. Crosby anytime he liked on his own time, but that it was a company time issue and that he would terminate him if it continued. Mr. Derfoldi admitted that employees are generally allowed to make personal calls on the company system.

According to Mr. Winchester, Mr. Derfoldi told him that a corporate investigator looking through telephone records had found evidence that Mr. Crosby had illegally gained access to the telephone radio and telephone network, and that Mr. Winchester had been talking to Mr. Crosby using the equipment. Mr. Derfoldi said he was upset that Mr. Crosby had been talking to Mr. Winchester using a two-way radio system designed for Respondent's employees. Mr. Winchester told Mr. Derfoldi that the calls were not just social, that he was getting technical support information from Mr. Crosby. Mr. Derfoldi told Mr. Winchester that Mr. Crosby's connection on the telephone/radio would be shut off. Mr. Winchester received no discipline beyond an oral warning.

B. Discussion

1. Alleged 8(a)(1) Violations

a. Alleged threats by Mr. Hoppler

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act when Mr. Hoppler threatened Mr. Crosby with unspecified reprisals for engaging in protected activities. The General Counsel points to unrefuted testimony that when Mr. Crosby returned to work on July 5, Mr. Hoppler declined to shake hands with him and said he was unwilling to try to get along with "someone who stabs me in the back." The General Counsel also points to a meeting later that day, where Mr. Hoppler accused Mr. Crosby of stabbing him in the back and being sneaky and unmanly.[20] The General Counsel argues that Mr. Hoppler thereby communicated an implied threat of unspecified reprisal against Mr. Crosby.

While employers are free under Section 8(c) of the Act to express their views, arguments, or opinions about and regarding protected activity as long as such expressions are unaccompanied by threats of reprisals, force, or promise of benefit, Section 8(a)(1) prohibits certain speech and conduct deemed coercive. A review of Board case law suggests that derogatory statements are not per se violative of Section 8(a)(1). In *Baptist Hospital, Orange,* 328 NLRB 628, 635 (1999), the employer's supervisor accused an employee of being a "back-stabber" because she did not follow the chain of command in complaining to upper management. However, no independent 8(a)(1) violation was identified based on the statement,[21] and the Board declined to find that referring to union supporters as "clowns" in a letter to employees violated Section 8(a)(1). *Carrom Division,* 245 NLRB 703 fn. 1 (1979). Statements equating protected activity with disloyalty are generally evaluated in the context of an employer's unlawful interference and coercion related to protected rights. See *Fieldcrest Cannon, Inc*., 318 NLRB 470 (1995); *Wilker Bros. Co.,* 236 NLRB 1371 (1978), and cases cited by the General Counsel, which involve specific threats as well as denigration of an employee.[22]

In *Sea Breeze Health Care Center,* 331 NLRB No. 149 (2000) and cases cited therein, however, the Board stated that an employer's expression of extreme disappointment with union activity equated protected activity with disloyalty, was coercive, and contained a veiled threat of reprisal in retaliation for protected activity. Guided by the Board in *Sea Breeze,* I conclude that Mr. Hoppler's remarks, although made in a context free from any other unlawful statements, equate Mr. Crosby's protected activity with disloyalty and constitute a withdrawal of supervisory friendship and approval which is tantamount to a veiled threat of reprisal. As such, Mr. Hoppler's statements violate Section 8(a)(1) of the Act.

b. Alleged threats by Mr. Derfoldi

The General Counsel alleges that on or about July 6, Mr. Derfoldi threatened employees with discharge for failing to participate in union activities.

This allegation rests on a statement made by Mr. Derfoldi to Mr. Crosby during their meeting of July 5, that Mr. Derfoldi considered it insubordination when Mr. Crosby refused to recognize everybody's authority in the room. That in itself, Mr. Derfoldi said, was grounds for termination—refusing to do work or take specific jobs . . . .—if [Mr. Crosby] had a complaint, unless he didn't want to go to the job [Mr. Derfoldi] assigned him . . . . he needed to file a complaint with the Union." The General Counsel argues that by this statement, Mr. Derfoldi unlawfully threatened Mr. Crosby that his refusal to recognize the union steward and, presumably, follow union grievance procedures was grounds for termination.

Counsel for the General Counsel correctly summarizes the law as holding that an employer violates the act by adverse action toward an employee because of his opposition to a union official or a refusal to engage in union activities. If Mr. Derfoldi's statement could be reasonably and objectively comprehended as a threat that Mr. Crosby might be terminated because he declined to recognize Mr. Madden as his union representative, then the statement is, as Counsel for the General Counsel argues, a threat in violation of the Act. Mr. Derfoldi's subjective intent in making the statement or Mr. Crosby's reaction to it is not a determinative consideration, e.g. Swift *Textiles*, 242 NLRB 691 fn. 2 (1979). "The issue is whether objectively . . . . remarks reasonably tended to interfere with the employee's right to engage in [a] protected act." *Southdown Care Center,* 308 NLRB 225, 227 (1992).

I cannot find that a reasonable person would regard Mr. Derfoldi's statement as an unlawful threat. Although he said he considered Mr. Crosby's refusal to recognize "everybody's authority in the room" to be insubordination, Mr. Derfoldi further explicated what he thought constituted grounds for termination: refusing to do work or to take specific jobs. His further reference to the Union was merely that if Mr. Crosby had a complaint and did not want to go to the assigned job, he needed to file a complaint with the Union. Thus, in spite of his initial broad charge that Mr. Crosby's rejection of "everybody's authority" was insubordinate, Mr. Derfoldi immediately narrowed the grounds for termination to encompass only Mr. Crosby's refusal to do work or take specific jobs. I conclude that Mr.

[20] As set forth above, there is doubt as to whether those statements were made at the meeting on July 5, or an earlier meeting in May. However, for purposes of determining whether the statements violated Section 8(a)(1), the timing is not important.

[21] See also, *Ekstrom Electric,* 327 NLRB 339 (1998).

[22] *Golden Eagle Spotting Co.,* 319 NLRB 64 (1995); *Belding Hausman Fabrics,* 299 NLRB 239 (1990); and *Southern Illinois Petrol, Inc.*, 277 NLRB 160 (1985).

Derfoldi's caution to Mr. Crosby that his words were grounds for termination are reasonably susceptible of a lawful interpretation, i.e., that refusing to accept job assignments could result in termination. In reaching this conclusion, I note that none of the other participants related any statement that could be construed as a threat to Mr. Crosby for refusing to accept Mr. Madden's authority. Mr. Crosby testified that Mr. Derfoldi's warning was made after Mr. Sorenson and Mr. Madden left the meeting, which would explain their silence on the subject, but even his version of what was said does not link any threat to his rejection of Mr. Madden. Mr. Crosby testified only that Mr. Derfoldi told him that his comments would get him terminated. As there is insufficient basis to ascribe an unlawful rather than a lawful meaning to Mr. Derfoldi's words, I cannot find that he threatened Mr. Crosby with discharge because he refused to recognize the authority of the union steward or to pursue his concerns through the Union. See *Pullman Power Products Corp.,* 275 NLRB 765 (1985). Accordingly, I shall dismiss this allegation of the complaint.

The General Counsel, in his amendment to the complaint, further alleges that Mr. Derfoldi, in January 2001, threatened employees with layoff for their protected concerted activities and their participation in Board proceedings. This allegation rests on Mr. Derfoldi's statements to Mr. Winchester in January 2001. Mr. Derfoldi's prohibition of Mr. Winchester's use of the company telephone system to talk to Mr. Crosby was based on no established company rule but rather on Mr. Crosby's "issues" with the company." The issues referred to must have comprehended Mr. Crosby's having filed a grievance concerning his discharge and/or a charge with the Board. It is irrelevant that Mr. Crosby may unlawfully have obtained access to the company telephone system. Mr. Winchester was not charged with any wrongdoing, and the thrust of the prohibition was to single Mr. Winchester out for restriction on telephone use and thereby interfered with his right to discuss protected matters with others.

The restriction and the accompanying oral warning were, therefore, violative of Section 8(a)(1).

c. July 10 layoff of Mr. Crosby

Employees acting together to report or complain of supervisor misconduct falls clearly under the umbrella of employee rights that are protected by Section 7 of the Act.[23] There is no dispute that the complaint letter circulated and presented to Respondent in May constituted concerted protected activity. The evidence is also clear that Mr. Crosby was its chief proponent and that Respondent was aware of the scope of his involvement.[24] The question is whether Respondent bore animus toward Mr. Crosby because of his protected activities and retaliated by laying him off in July.

There is no evidence Mr. Hassaneih or Mr. Burton had animus toward Mr. Crosby or any employee because of the complaint letter. Indeed, the two company officials were, by all accounts, very concerned about employee complaints and took immediate and extensive steps to resolve them. Mr. Hassaneih also committed himself to scrutinizing any unit personnel action taken in the Las Vegas branch, and his overall conduct in dealing with the complaint letter militates against any finding that he or any corporate officer resented employees' exercise of protected rights. Mr. Hassaneih's lack of animus is significant because it was Mr. Hassaneih who determined and urged that Respondent lay off unit employees at its Las Vegas branch.

The evidence shows that Respondent experienced a business turndown in 2000. In response, Mr. Hassaneih determined that economic expediency required a layoff of employees in the Las Vegas office. The General Counsel contends that Respondent's economic defense is a sham, arguing that Respondent did not document the asserted loss of two large service contracts. Respondent did, however, document the slowdown in business. While the General Counsel argues that the 2000 earnings were not significantly off plan target, the Board has made it clear that an employer's "business conduct is not to be judged by any standard other than that which it has set for itself." *FPC Advertising, Inc.,* 231 NLRB 1135, 1136 (1977). Moreover, "[w]hether procedures other than a layoff might have been more or equally effective in remedying the Respondent's economic loss is not a matter the Board is empowered to decide. The Board's authority . . . . extends only to the determination of whether the conduct is discriminatorily motivated or otherwise in violation of the Act." *Gem Urethane Corp.,* 284 NLRB 1349 at 1350 (1987).[25] In light of Respondent's documented economic situation, and in absence of any evidence of animus on Mr. Hassaneih's part, there is no evidence that Mr. Hassaneih's insistence on layoffs was other than a legitimate business response to fiscal exigencies. Mr. Hassaneih's credible testimony reveals that he pressed for layoffs prior to the creation of the complaint letter and did not deviate from or alter that approach as one proposed solution to Respondent's economic problems. Moreover, the evidence shows that no one was hired to replace Mr. Crosby in the applied mechanic position. Although a unitary mechanic was hired, as that classification is paid at a lower rate than Mr. Crosby's and as Respondent's service focus was shifting from applied work, the addition of a unitary mechanic does not contradict Respondent's assertion that it was attempting to reduce labor costs. Moreover, the newly-hired unitary mechanic was thereafter laid off, and additional workforce reduction through attrition occurred after Mr. Crosby was laid off. While, as the General Counsel points out, Mr. Webb was apparently promoted to journeyman status effective April 3, 2001, I cannot infer discriminatory motive from that fact or from Respondent's failure to call Mr. Crosby back to work. Mr. Crosby had, by that time, relocated to Florida, and Respondent believed he had, post-layoff, unlawfully signed himself on to the company telephone system. Either was a nondiscriminatory reason for failing to recall Mr. Crosby. I conclude that in urging technician layoffs, Mr. Hassaneih was motivated by a valid desire to reduce Respondent's labor costs and stem its economic losses. Consequently, I find that the General Counsel

[23] See *Georgia Farm Bureau Mutual Insurance Co.*, 333 NLRB No.100 (2001), and *Baptist Hospital, Orange*, above.

[24] Respondent argues that Mr. Hoppler and Mr. Derfoldi did not know the extent of Mr. Crosby's activity, and that Mr. Winchester as the circulator of the letter was more actively involved than Mr. Crosby. Although there is no direct evidence that Mr. Hoppler or Mr. Derfoldi knew of Mr. Crosby's catalytic role in the complaint letter, given the extensive discussion of the matter between upper management and employees, Mr. Hoppler's employee interviews, and Mr. Hoppler's refusal to shake hands with Mr. Crosby and accusation of disloyalty, knowledge can reasonably be inferred.

[25] In keeping with the Board's position, I have not considered the General Counsel's assertion that an ineffective sales force was the source of Respondent's economic problems or that failure to focus on the sales department was evidence of a pretextual economic defense.

has not met his burden of proving the layoff decision was based on any unlawful consideration.

Concluding that the motivation for the layoff was nondiscriminatory, however, answers only half the question. Remaining is the issue of whether Mr. Crosby was discriminatorily selected for layoff because of his prominent participation in the complaint letter. If Respondent selected Mr. Crosby for layoff in retaliation for the complaint letter, such is violative of Section 8(a)(1) of the Act. *Georgia Farm Bureau,* above. I analyze the lawfulness of Mr. Crosby's selection by applying the Board's analytical framework set out in *Wright Line*.[26] Under this framework, the General Counsel must make a prima facie showing sufficient to support an inference that animosity toward Mr. Crosby's protected activity was a motivating factor in his selection for layoff. The prima facie case may be established by proving the following four elements: (1) the alleged discriminatee engaged in union or protected concerted activities; (2) Respondent knew about such activity; (3) Respondent took adverse employment action against the alleged discriminatee; and (4) there is a link or nexus between the protected activity and the adverse employment action. *Signature Flight Support,* 333 NLRB No. 144 (2001). The first three elements are established herein. Mr. Crosby clearly engaged in protected activity; Respondent knew of Mr. Crosby's protected activity, and Respondent laid off Mr. Crosby—an adverse employment action.

The pivotal factual inquiry in determining whether the General Counsel has made a prima facie showing involves the fourth element, i.e., whether there is a link or nexus between Mr. Crosby's involvement in the complaint letter and/or his protected rejection of Mr. Madden as union steward and his selection for layoff. In resolving this issue, it is necessary to determine, if possible, Respondent's motive in selecting Mr. Crosby. If the evidence shows that animosity toward Mr. Crosby's involvement in the complaint letter formed any part of the basis for his layoff selection, then the General Counsel has made his prima facie case.[27]

Motive is a question of fact, and the Board may infer discriminatory motivation from either direct or circumstantial evidence. Since direct evidence is rare, evidence of an employer's motive in personnel actions must frequently be gleaned from the circumstances surrounding the actions. Indications of discriminatory motive may include expressed hostility toward the protected activity,[28] abruptness of the adverse action,[29] timing,[30] failure to conduct a full and fair investigation,[31] failure to disclose the reason for the action,[32] false assertion of lawful purpose,[33] pretextual reason,[34] disparate treatment,[35] departure from past practice,[36] and/ or the employer's inability to adhere to a consistent explanation for the action.[37]

Respondent argues that there is no evidence of "union" animus on its part, citing its apparently harmonious contractual relationship with the Union. That does not preclude the possibility of animus toward protected activities other than union activity. See *CWI of Maryland, Inc.,* 325 NLRB 791 (1998). The General Counsel argues that Mr. Hoppel had knowledge of Mr. Crosby's involvement in the complaint letter and bore him considerable animosity for it. I agree that Mr. Hoppel had both knowledge and animosity. However, while Mr. Hoppel demonstrated undeniable hostility toward Mr. Crosby, there is no credible evidence that Mr. Hoppel selected Mr. Crosby for layoff or influenced anyone else's selection. All persuasive evidence supports the conclusion that Mr. Derfoldi, in conjunction with Mr. Sorensen and Mr. Madden, chose Mr. Crosby for layoff.[38] That Mr. Hoppler approved the selection and took responsibility for it at the union grievance meeting reflects nothing more than an exercise and an affirmation of his ultimate authority in layoffs. It does not, as the General Counsel asserts, show that Mr. Hoppler "actually made the decision to select [Mr.] Crosby." It may well be, as the General Counsel argues, that Mr. Hoppler wished to retaliate against Mr. Crosby for the complaint letter, and it may be that Mr. Hoppler was delighted by his selection. However, the mere fact that an employer may desire to terminate an employee to curtail union activities or, as here, to punish protected concerted activity, does not, of itself, establish the illegality of the layoff. The fact that Mr. Hoppler may have welcomed the selection of Mr. Crosby as layoff candidate does not prove that Mr. Hoppler made the selection or render the layoff unlawful. *Klate Holt Co.,* 161 NLRB 1606, 1612 (1966); *Avondale Industries, Inc.*, 329 NLRB 1064 (1999).

Counsel for the Charging Party argues that Mr. Derfoldi's assuming responsibility for the layoff was a contrived attempt at deflecting blame from Mr. Hoppler. I have considered that in selecting Mr. Crosby for layoff, Mr. Derfoldi was proxy for Mr. Hoppler. However, there is no direct evidence of this, and it cannot be inferred from the circumstances. It cannot be assumed that Mr. Derfoldi felt resentment at employees' criticism of Mr. Hoppler; therefore, there must be some evidence that Mr. Derfoldi took offense at the complaint letter. There is no such evidence.

Mr. Derfoldi is not accused of having expressed any animosity toward Mr. Crosby for his part in the complaint letter; there is no evidence that he felt any ill will toward any employee because of the letter and no evidence he engaged in machinations with Mr. Hoppler to terminate Mr. Crosby.

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[26] 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[27] Once the General Counsel has made its prima facie case, the burden shifts to Respondent to show, in essence, that it would have taken the same action, for nondiscriminatory reasons, even in the absence of protected activity.

[28] *Mercedez Benz of Orland Park,* 333 NLRB No. 127 (2001).

[29] *Dynabil Industries,* 330 NLRB 360 (1999).

[30] *Bethlehem Temple Learning Center, Inc.,* 330 NLRB 1177 (2000).

[31] *Bonanza Aluminum Corp.,* 300 NLRB 585 (1990).

[32] *Dynabil Industries,* above; *NLRB v. Griggs Equipment,* 307 F.2d 275 (5th Cir. 1962).

[33] *Sahara Las Vegas Corp,* 284 NLRB 337 (1987).

[34] *Pacific FM, Inc.,* 332 NLRB No. 67 (2000); *Fluor Daniel,* 311 NLRB 498 (1993).

[35] NACCO *Materials Handling Group, Inc.*, 331 NLRB No. 164 (2000).

[36] *Sunbelt Enterprises,* 285 NLRB 1153 (1987).

[37] *Atlantic Limousine,* 316 NLRB 822 (1995).

[38] The General Counsel strongly relies on the emails between Mr. Hoppler and Mr. Derfoldi as establishing Mr. Hoppler's involvement in the selection. I agree that the emails are confusing—even suspicious—and have not been explained. However, The Board has observed that even when the record raises substantial suspicions regarding adverse action against employees, the General Counsel is not relieved of his burden of proving that Respondent was illegally motivated. *Murphy Bros.,* 267 NLRB 718 (1983); *Carrom Division,* 245 NLRB 703 (1979). As set forth above, I cannot find the emails to constitute persuasive evidence that Mr. Hoppler selected Mr. Crosby for layoff.

I have also considered whether Mr. Derfoldi's selection of Mr. Crosby for layoff was motivated, at least in part, by Mr. Crosby's rejection of Mr. Madden as his Union steward. Mr. Derfoldi testified that his July 5 meeting with Mr. Crosby played a considerable part in his decision to select him for layoff, and admittedly Mr. Crosby's conduct included a refusal to recognize Mr. Madden as union steward. For reasons set forth above, I conclude that the effect of Mr. Crosby's refutation of Mr. Madden was too minimal to play any significant role in the layoff decision. It is clear that Mr. Derfoldi focused on Mr. Crosby's disavowal of his and Mr. Sorenson's authority when warning Mr. Crosby about his statements, and there is no evidence that there was any other discussion or concern about Mr. Crosby's objection to Mr. Madden's stewardship. Accordingly, I find Mr. Crosby's protected objection to Mr. Madden as union steward was not an appreciable factor in Mr. Derfoldi's layoff selection.

There is no evidence of any false or pretextual basis for the layoff or the selection. Respondent has demonstrated its economic need for a reduction in labor costs, and employees must have known the business slowdown as their shifts had been shortened. Certainly, Mr. Crosby was aware of the slowdown as he had been asked to extend his medical leave because of lack of work. Although Mr. Derfoldi had no documentation of poor work by Mr. Crosby and had not disciplined him in any way because of customer complaints, there is no evidence of pretext or pretense in Mr. Derfoldi's opinion that Mr. Crosby had more complaints than other employees. Evidence that Mr. Crosby was a skilled and dependable technician was presented, and evidence of complaints about Mr. Crosby's work was also presented. It is not necessary for me to resolve those conflicting views of Mr. Crosby's work. The Board requires more than discredited reasons to establish motivation. In *Garrett Flexible Products,* 270 NLRB 1147, 1148 (1984), the Board held, that "the question of motivation where an unlawful discharge is alleged is not answered by discrediting a respondent's asserted reason for the discharge. Rather, the answer to that question rests upon an evaluation of all the relevant evidence."[39] Mere suspicion that animosity toward protected activity may have motivated or contributed to the decision to lay off Mr. Crosby is not enough. Mr. Derfoldi may have been wrong in his assessment of Mr. Crosby's work; he may have exaggerated his performance deficiencies, but unless there is evidence that he was motivated in his selection of Mr. Crosby by unlawful considerations, the accuracy of his perceptions is not critical. It is merely a factor to be considered in an evaluation of all the relevant evidence. Inaccuracy alone cannot prove unlawful motive, and there is no other evidence that Mr. Derfoldi had any animosity toward Mr. Crosby's protected activities.

Further, the selection of Mr. Crosby for layoff was not Mr. Derfoldi's decision alone. The evidence shows that Mr. Sorensen and Mr. Madden concurred. There is no basis for me to infer that they were influenced by improper animus. Moreover, Mr. Derfoldi, even if mistaken in his assessment of the quality of Mr. Crosby's work or work ethic, had a concrete and lawful reason for selecting Mr. Crosby for layoff. Credited testimony establishes that Mr. Crosby engaged in inappropriate, if not insubordinate, behavior when he told Mr. Derfoldi that he did not recognize his or Mr. Sorenson's authority. Mr. Crosby's conduct in that instance was in no way protected. Mr. Derfoldi testified that Mr. Crosby's noncompliant behavior to him colored all other factors relied on in selecting Mr. Crosby. There is no persuasive evidence that contradicts Mr. Derfoldi's explanations of why he selected Mr. Crosby for layoff. I find, therefore, that the necessary link between Mr. Crosby's layoff and his protected activities has not been established. The General Counsel has not, therefore, provided evidence sufficient to support an inference that animosity toward Mr. Crosby's protected activity was a motivating factor in his layoff and, thus, has not established a prima facie case. Accordingly, I find the General Counsel failed to meet his burden of proof to show that Respondent was motivated by unlawful considerations and violated Section 8(a)(1) of the Act by laying off Mr. Crosby. Inasmuch as I have found that the General Counsel has failed to establish a prima facie case that Respondent interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the act by laying off Mr. Crosby, the companion allegation of unlawful refusal to reinstate also fails. Accordingly, I shall dismiss those allegations of the complaint pertaining to the layoff of Mr. Crosby.

CONCLUSIONS OF LAW

1. By equating protected activity with disloyalty, making implied threats of reprisal, and prohibiting employees from talking with others about protected activities, including Board proceedings, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. Respondent has not violated the Act in any other manner alleged in the complaint.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[40]

ORDER

The Respondent, Carrier Corporation, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Equating protected activity with disloyalty to Carrier Corporation.

(b) Making implied threats of reprisals to employees because they engaged in protected concerted activities.

(c) Prohibiting employees from talking with others about concerted protected activities, including Board proceedings.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada copies of the attached notice

[39] See also *Pullman Power Products,* 275 NLRB 765, 767 (1985).

[40] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

marked "Appendix."[41] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 2000.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated: August 10, 2001

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT equate protected activity with disloyalty to Carrier Corporation.

WE WILL NOT make implied threats of reprisals to you because you engage in activities protected under Section 7 of the Act, described above.

WE WILL NOT prohibit you from talking with others about activities, including Board proceedings, protected under Section 7 of the Act, described above.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

CARRIER CORPORATION

[41] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "posted by order of the national labor relations board" shall read "posted pursuant to a judgment of the united states court of appeals enforcing an order of the national labor relations board."